

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE

MELVIN WAYNE COOPER and
JODONNA ANNE COOPER,

Debtors.

)
) Bankruptcy Case
) No. 10-66447-fra12

)
) MEMORANDUM OPINION¹

Debtors-in-Possession, Jodonna and Melvin Cooper (DIPs) filed their Chapter 12 petition on October 27, 2010. The instant matter comes before the Court on Citizens Bank (Citizens) and JP Morgan Chase Bank's (Chase) objections to confirmation of DIPs' modified plan dated June 8, 2011 (the modified plan). The matter was heard on July 19, 2011. At that time, the Court invited written closing arguments, identifying several issues it wished the parties to discuss. The arguments have been submitted and the matter is ripe for decision. The Court's opinion will concentrate on two issues. The first centers on DIPs' eligibility to proceed in Chapter 12, the second on valuation of real property.

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¹This disposition is not intended for publication.

1 Eligibility:

2 As noted, at the hearing, the Court had concerns about DIPs' eligibility to proceed in Chapter 12, and
3 *sua sponte* invited briefing on the issue.²

4 Under 11 U.S.C. § 109(f) ³ “[o]nly a family farmer . . . may be a debtor under Chapter 12”
5 Section 101(18)(A) defines “family farmer” in relevant part as an “individual and spouse . . . engaged in a
6 farming operation . . . [who] receive from such farming operation more than 50 percent of . . . such
7 individual and spouse’s gross income for- the taxable year preceding . . . or each of the 2d and 3d taxable
8 years preceding . . . the taxable year in which the case . . . was filed.” (emphasis added). DIPs have the
9 burden to prove eligibility. In re Powers, 2011 WL 3663948, *1 (Bankr. N.D. Cal. 2011). Because DIPs
10 filed their Chapter 12 petition in October, 2010, for purposes of the gross income requirement, the Court
11 looks to DIPs’ income figures for 2009, or alternatively for 2008 and 2007. In arguing they meet the gross
12 income requirement, DIPs point to their Exhibit D-1’s (“Financial Review of Farming Business”) filed earlier
13 in the case. DIPs’ written Closing Argument at 4:9-12 (Docket #61). Those Exhibits contain no information
14 relating to DIPs’ 2007 or 2008 operations. DIPs thus rely solely on their 2009 operations to qualify. In that
15 year, they operated 3 businesses through wholly owned limited liability companies and have filed separate
16 Exhibit D-1’s for each.⁴

18 ²It is axiomatic that eligibility is a threshold requirement to confirming a reorganization plan.
19 § 1225(a)(1) (the plan must comply “with the provisions of this chapter and with the other applicable provisions of this
20 title.” The court may thus *sua sponte* raise eligibility as an issue. In re Berenato, 226 B.R. 819, 823 (Bankr. E.D. Pa.
21 1998).

21 ³Unless otherwise noted, all subsequent statutory references are to Title 11 of the United States Code.

22 ⁴Courts in general have used the federal tax definition of “gross income” for purposes of § 101(18)(A). See,
23 e.g., In re Lamb, 209 B.R. 759, 760-61 (Bankr. M.D. Ga. 1997). No party in interest argues this Court should do
24 otherwise. Unless its members elect otherwise, (here there is no indication of such an election), for federal tax
25 purposes, income from limited liability companies with two or more members, as here, is treated as partnership income
26 for tax purposes. 26 C.F.R. § 301.7701-3(b)(i); Gregg v. U.S., 186 F. Supp.2d 1123, 1126 (D. Or. 2000). In turn, a
27 partnership’s gross income “passes through” to the distributive shares of the individual partners, or here “LLC”
28 members. 26 U.S.C. § 702(c); see also, Lamb, 209 B.R. at 761 (distributive share of partnership’s gross income
29 counted for each partner for § 101(18)(A) purposes). Because DIPs were the sole members of their limited liability

(continued...)

1 The first business was a vineyard operated as “Shadow Mountain Vineyards LLC” (SMV).⁵ SMV’s
2 Exhibit D-1 reflects \$141,465 in gross 2009 income. The second, “Shadow Mountain Tree Farms LLC”
3 (SMTF) grew Christmas trees on leased land and sold them on the wholesale and retail markets. SMTF’s
4 Exhibit D-1 indicates \$375,492 in 2009 gross income. The third, “Valley View Christmas Trees LLC”
5 (VVCT) was also a Christmas tree business. However instead of growing the trees, VVCT purchased
6 mature trees from third parties and sold them mainly on the retail market at locations in Arizona. VVCT
7 grossed \$1,122,576 in 2009. There is no dispute that SMV and SMTF were engaged in farming operations.
8 However, the gross income from these two companies totaled only 31.5% of DIPs’ total gross 2009 income.
9 The question then becomes whether VVCT’s operations qualified as a “farming operation” for eligibility
10 purposes.

11 Under § 101(21), a “farming operation” “includes farming, tillage of the soil, dairy farming,
12 ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock
13 products in an unmanufactured state.” This list is not exclusive. § 102(3)(the term “includes” is not
14 limiting). Given Chapter 12’s remedial purposes, “farming operation” is to be broadly construed, In re Sugar
15 Pine Ranch, 100 B.R. 28, 31 (Bankr. D. Or. 1989), but not so broadly “so as to eliminate the definition
16 altogether by bringing in operations clearly outside the nature or practices one normally associates with
17 farming.” In re Cluck, 101 B.R. 691, 695 (Bankr. E.D. Okla. 1989)(internal quotation omitted). This District
18 uses a “totality of the circumstances” test to determine whether a Chapter 12 debtor is engaged in a “farming
19 operation.” Sugar Pine Ranch, 100 B.R. at 31. Some of the factors to be considered are:

- 20 1. Whether the location of the operation would be considered a traditional
21 farm;
- 22 2. The nature of the enterprise at the location;
- 23 3. The type of product and its eventual market;
- 24 4. The physical presence or absence of family members on the farm;
- 25 5. Ownership of traditional farm assets;

26 ⁴(...continued)
companies, all of those companies’ gross incomes will be attributed to DIPs for purposes of the 50% gross income
requirement.

⁵SMV’s operations are described in more detail in the “Valuation” section below.

1 6. Whether the debtor is involved in the process of growing or developing
2 crops or livestock; and
3 7. Perhaps the key factor is whether or not the practice or operation is subject
4 to the inherent risks of farming.

5 Id. (internal citations and quotations omitted). Under the Sugar Pine Ranch test, VVCT's retailing of
6 Christmas trees purchased from third parties⁶ does not constitute a "farming operation." The company did
7 not cultivate the trees; it merely marketed them. Any inherent farming risk, such as disease, weather, market
8 fluctuations in seedling costs, etc. were at most "indirect." See, In re Jones, 2011 WL 3320504, *3 (Bankr.
9 D. Or. 2011) (fixed fees for horse boarding and related activities were only indirectly tied to farming risks).
10 As one court succinctly stated: "The mere purchase and sale of farm by-products is not necessarily a
11 'farming operation.'" Federal Land Bank of Columbia v. McNeal (In re McNeal), 848 F.2d 170, 172 (11th
12 Cir. 1988).⁷ Were it otherwise, the corner vegetable/fruit market or butcher would qualify for Chapter 12
13 relief. This is clearly not what Congress intended. DIPs are thus ineligible for Chapter 12 relief.

14 Valuation:

15 DIPs own two 20.4 acre parcels of land in rural Lane County, Oregon (the north and south parcel,
16 respectively). They reside in a modern 4-bedroom, 3,658 square foot home on the south parcel. Up until the
17 time of filing, SMV operated both parcels as a vineyard. Chase holds a note and first position trust deed on
18 the south parcel. It has filed a secured proof of claim for \$749,172.06. Citizens holds a note and amongst
19 other security, second position trust deed on the south parcel and first position trust deed on the north parcel.
20 It has filed a proof of claim for \$1,300,000 secured, and \$23,938.05 general unsecured. In the

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23 ⁶There is no evidence as to whether any of SMTF's trees were part of VVCT's inventory, and if so, how many.
24 The inference is none, as both companies reported their own sales/income figures. Even assuming *arguendo* that
25 VVCT sold some of SMTF's trees, it would be pure speculation to find that those sales pushed gross revenues (from
26 DIPs' own trees) past the aggregate 50% mark. Again, DIPs have the burden of proving eligibility.

⁷See also, In re Dakota Lay'd Eggs, 57 B.R. 648, 656 (Bankr. D.N.D. 1986) (portion of debtor's business
which purchased eggs on the open market for resale was not a "farming operation").

1 modified plan, DIPs propose to retain the south parcel, value it at \$490,000, and “cram-down” Chase’s
2 secured claim to that value, which would leave no equity on the south parcel for Citizens’ second trust deed.⁸
3 The modified plan proposes to surrender the north parcel to Citizens. Both Chase and Citizens objected to
4 DIPs’ valuation of the south parcel.

5 Under § 1225(a)(5)(B), a Chapter 12 debtor-in-possession may treat a secured claim by paying the
6 “allowed amount of such claim” as of the plan’s effective date. The “allowed amount” of a secured claim, at
7 least when valuation of collateral is the issue, is governed by § 506(a), which defines a secured claim as the
8 value of the creditor’s interest in the estate’s interest in the collateral. When the collateral’s value is less
9 than the debt owed against it, the amount of the secured claim is fixed at the collateral’s value. Under §
10 506(a), value is to be determined “in light of the purpose of the valuation and of the proposed disposition or
11 use of such property, and in conjunction with any hearing . . . on a plan affecting such creditor’s interest.”
12 Where property is being retained as proposed here, it is to be valued at “fair market value” without regard to
13 liquidation costs. In re Mikkelsen Farms, Inc., 74 B.R. 280, 292 (Bankr. D. Or. 1987). At the confirmation
14 hearing, Mr. Cooper testified that of the 20.4 south parcel acres, 8.6 were producing grapes (4.2 in pinot noir
15 and 4.4 in pinot gris), while an additional 3.2 had just been planted and were in their bud stage. The
16 remainder of the acreage contains the homestead, roads, a pond, a creek, and land not suitable for planting
17 grapes.

18 DIPs and Citizens each presented expert appraisal testimony. DIPs’ appraiser valued the south parcel
19 at \$525,000. He then subtracted approximately \$37,000 in deferred maintenance to reach a \$488,000 net
20 valuation. In stark contrast, Citizens’ appraisers valued the south parcel at \$820,000. DIPs’ appraisal was
21 premised on the assumption the south parcel would be used for residential purposes, with the grapevines and
22 trellises as “landscaping,” and with the vineyard operated as a “hobby farm.” Citizens’ appraisal was more
23 comprehensive and was premised on the south parcel being used as a “part-time” vineyard farm. Mr. Cooper
24 testified he will continue to cultivate and harvest the 8.6 producing acres as well as nurse the just-planted 3.2

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26 ⁸DIPs propose to pay Chase’s secured claim on a 30 year amortization at 4.25% interest, in monthly
instalments of \$2,410.51, with the first 36 instalments paid by the Chapter 12 Trustee.

1 acres to maturity. Cultivating, harvesting, marketing and selling 11.8 acres of grapes seems less of a hobby
2 and more like a “part-time” occupation, as assumed by Citizens’ appraisal. Further, Mr. Cooper’s own
3 projections belie mere “hobby” status. SMV’s Exhibit D-1 projects \$112,000 in gross annual income and
4 \$129,718 in expenses, both significant amounts. The grapes are being worked. They deserve to be valued as
5 more than just amenities. Citizens’ appraisal is thus more reliable. It rightly presumes a highest and best use
6 as a “part-time” vineyard, which in fact tracks DIPs’ intended use. Consistent with that use, it values the
7 planted acreage as a producing vineyard, rather than relegating it to “amenity” or “landscaping” status. It
8 uses “vineyard” (many with home-sites) comparables as opposed to “rural residential” comparables used in
9 DIPs’ appraisal. Finally, it was performed by two experienced farm appraisers, while DIPs’ appraiser had no
10 experience valuing agricultural properties. However, because DIPs cannot go forward in Chapter 12, the
11 Court need not at this juncture determine the south parcel’s exact value. It is sufficient to conclude that
12 DIPs’ value is too low to be confirmable.

13 Based on the above, confirmation of the modified plan is denied. An order will be entered 14 days
14 from entry of this opinion dismissing the case unless in the interim DIPs elect to convert to another chapter.
15 The above constitute the Court’s findings of fact and conclusions of law under FRBP 7052. They shall not be
16 separately stated.

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20 FRANK R. ALLEY, III
21 Chief Bankruptcy Judge
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